BEFORE THE COASTAL ZONE INDUSTRIAL CONTROL BOARD OF THE STATE OF DELAWARE

IN THE MATTER OF COASTAL ZONE STATUS DECISION ON THE APPLICATION OF Crown Landing LLC	)))	APPEAL NO. CZ 2005-01

DECISION AND ORDER

Pursuant to notice, a public hearing was held on March 30, 2005, in the Conference Center of Delaware Technical & Community College, Stanton Campus, Newark, Delaware, concerning the appeal filed on February 15, 2005, by Crown Landing LLC and the appeal filed on February 18, 2005, by *pro se* appellants John M. Kearney, Maryann McGonegal, Alan Muller and John D. Flaherty of a status decision of the Secretary of the Department of Natural Resources and Environmental Control issued February 3, 2005. Members of the Coastal Zone Industrial Control Board ("the Board") present were: Christine M. Waisanen, Chair, John Allen, Paul Bell, Albert Holmes, Pallather Subramanian and Victor Singer. Absent was Robert D. Welsh. John S. Burton and Judy McKinney-Cherry were disqualified from consideration of the matter. Phebe S. Young, Deputy Attorney General, represented the Board.

Crown Landing LLC was represented by David S. Swayze, Esq., and Michael W. Teichman, Esq., of Parkowski, Guerke & Swayze.

Collins J. Seitz, Jr., Esq. and Matthew Boyer, Esq., of Connolly Bove Lodge and Hutz LLP and Kevin Maloney, Deputy Attorney General, represented the Department of Natural Resources and Environmental Control ("DNREC") and DNREC Secretary John Hughes ("the Secretary").

PRELIMINARY MATTERS

On March 8, 2005 and March 9, 2005 respectively, Crown Landing LLC and DNREC filed motions to dismiss the appeals of John M. Kearney, Maryann McGonegal, Alan Muller and John D. Flaherty. The controlling statute, 7 *Del. C.* § 7007(b) provides that, "Any person aggrieved by a final decision of the Secretary of the Department of Natural Resources and Environmental Control under subsection (a) of § 7005 of this title may appeal same under this section." The disputed appeals favor the Secretary's status decision but include assertions that the *pro se* appellants are nevertheless "aggrieved" by the Secretary's failure to impose fines pursuant to 7 *Del. C.*§ 7011 for activities the *pro se* appellants allege the applicant has undertaken without a required permit. Additionally, the disputed appeals include the assertion that, "The DNREC under John Hughes has consistently failed to defend CZA decisions at the judicial level, and have (sic) demonstrated an alarming incompetence and lack of understanding of CZA issues, including failing to appeal a clearly erroneous decision rendered by the CZICB in regard to the Delaware Terminal Company, issued February 12, 2004; and the recent illegally negotiated settlement with the Premcor Refinery, issued January 25, 2005."

The Board determined that the *pro se* appellants were not "aggrieved" by the Secretary's decision within the meaning of the statute. By a vote of 5-0 with the Chair abstaining, the Board granted the motions to dismiss.

On March 16, 2005, the Delaware Chapter of Sierra Club, Delaware Chapter of the Audubon Society and Delaware Nature Society filed a joint Motion to Intervene together with a Motion for the Admission *Pro Hac Vice* of Kenneth T. Kristl, Esq., to

represent them in this matter. On March 17, 2005, John M. Kearney, Maryann McGonegal, Alan Muller and John D. Flaherty filed a Motion to Intervene.

The Board granted the Motion to Admit Mr. Krystl *pro hac vice*.

All proposed interveners conceded that permission to intervene is discretionary with the Board. Mr. Krystl argued, on behalf of his clients, that their intervention is necessary in order to preserve their right meaningfully to appeal a decision of the Board to the Superior Court because any Superior Court appeal is on the record. The Board determined that an adequate record would be created by the existing parties together with any statements and positions the proposed interveners might choose to make as members of the public. By a vote of 5-0, with the Chair abstaining, both motions to intervene were denied.

SUMMARY OF THE EVIDENCE AND FINDINGS OF FACT

Before the hearing, the Board had reviewed the record of proceedings below including Crown Landing LLC's Request for a Coastal Zone Status Decision with supporting factual and legal arguments, voluminous public comments, the Assessment and Recommendations of DNREC staff and the Decision dated February 3, 2005, from which the appeal is taken. The application seeks a status decision for a proposed new waterfront gasification facility for receiving and processing of liquefied natural gas (LNG). The proposed construction comprises a docking facility with an approximately 2,000-foot-long trestle pier providing a single berth designed to accommodate ships carrying LNG and a gasification plant located on land. The majority of the pier would be located within the State of Delaware, inside the coastal zone, and the remainder of the construction would be in the State of New Jersey. The application for a status decision

and the status decision itself relate only to that portion of the proposed construction located in Delaware. The Secretary's decision that the proposed facility is prohibited by the Coastal Zone Act includes his rationale:

> I find that your proposed facility represents a prohibited offshore bulk product transfer facility and does not meet the exemption under the bulk product transfer facility definition in that the facility cannot be considered a "manufacturing use" under the Act. Furthermore, I conclude that this facility, as proposed, exhibits characteristics sufficient to deem it a heavy industry, also prohibited under the Act. Finally, the on-shore tanks essential to the operation of the facility are prohibited structures.

The following witnesses were called by Crown Landing:

1. Lauren Segal, the Project Director for the Crown Landing project. Ms. Segal described the overall process of producing usable natural gas. The gas, which could come from wells virtually anywhere in the world, is chilled to liquid phase prior to being loaded onto ships which transport it to facilities such as the one proposed in this matter. Many contaminants of the gas are eliminated by the chilling process. At the proposed docking facility, the chilled liquid would be off-loaded and transferred through cryogenic pipes to tanks located on shore. Within the tanks, the liquid would be circulated. Also on shore, it would be diluted by the addition of small amounts of nitrogen if necessary to adjust the BTU content. The liquid then would be heated to gaseous phase and then pressurized before being transferred to transport pipelines. A small amount of odorizing substance, Mercaptan, necessary for safety, would be added before the gas is transported through the outgoing pipelines. Ms. Segal considers the process occurring after the LNG is removed from the ship to be manufacturing because it changes an unmarketable product into a marketable product.

Ms. Segal also presented testimony concerning the need for new LNG facilities, specifically in the Mid-Atlantic region, the suitability of the chosen site for an LNG facility and the steps taken by BP (Crown Landing LLC's parent company) to ensure safety of the LNG ships while in the Delaware River and the safety of the facility as a whole.

In response to a question from the Board, Ms. Segal testified that it is her judgment that if the facility for unloading LNG were substantially distant from the proposed site, that site would not be useful as the gasification facility.

2. Laurie J. Beppler, Engineering Manager for the Crown Landing project. Ms. Beppler described, in greater detail, the construction and operation of the proposed facility. Ms. Beppler testified that LNG could not be transported safely overland to the site from an off-loading dock located some distance away. Rather, the dock and the land-based components of the facility must be considered an integrated facility. As had Ms Segal, Ms. Beppler testified that, in her judgment, the proposed site would not be useful as the gasification facility if it were substantially distant from the facility for unloading LNG.

3. Dr. Georges Melhem, Chair and Chief Engineer of ioMosaic Corporation, a company specializing in safety consulting services. Dr. Melhem testified that the product going into the distribution pipelines from the proposed facility would be a new product, not the same product that was on the ship, and therefore the onshore component meets the definition of a manufacturing facility.

Dr. Melhem also testified as to the similarities and differences between the proposed facility and one located on adjacent land. The adjacent facility, the Logan

(formerly "Keystone") cogeneration plant, received a permit under the Act for a docking facility for the off-loading of coal that is subsequently burned to produce electricity. Dr. Melhem testified that the Logan facility has more characteristics of heavy industry than would the proposed Crown Landing facility and, therefore, he concludes that the proposed facility is not heavy industry.

4. Dr. William Fagerstrom, a professor in the Mechanical Engineering Department at the University of Delaware. Dr. Fagerstrom teaches a course in manufacturing and testified that, according to the definitions used in his class, the onshore component of the proposed Crown Landing construction is manufacturing. In particular, Dr. Fagerstrom pointed out that the nitrogen used to dilute the LNG is "manufactured" on site.

5. David Blaha, of Environmental Resources Management Group, Inc., an expert in evaluating the potential environmental impact of projects. He emphasized the superiority of LNG as a fuel, the greater potential for pollution of the Logan cogeneration plant and the appropriateness of the site selected for the Crown Landing facility, primarily because the facility could use waste heat from the Logan cogeneration plant.

DNREC called Dr. Stanley I. Sandler as its only witness. Dr. Sandler gave a written statement as well as live testimony. Dr. Sandler testified that the onshore component of the proposed facility would not manufacture a new product or transform in any significant way the natural gas off-loaded from a ship at the dock. To the extent that natural gas is processed in a meaningful context, that processing occurs at the well head as the gas is captured and chilled. The gas that would leave the ship at the dock is essentially the same product that would enter the distribution pipelines.

At least eleven members of the public were heard by the Board. Most of the testimony of these speakers was directed to the dangers, real or perceived, of an LNG facility and ships carrying LNG up the Delaware River due to vulnerability to intentional attack, catastrophic accident or other failures. In addition, many speakers' comments concerned negative impacts on neighboring communities such as the impact on recreation and on business efficiency.

One witness argued that the proposed facility is essentially identical to the Logan facility, is a necessary addition to the economy of the region and will ensure the availability of natural gas essential to the production of electricity as well as growth of important industry in the region. The possibility of as many as fifty new jobs in the region was mentioned.

Every witness who addressed the issue testified that the onshore component of the proposed construction includes some but not all characteristics of a "heavy industry" as defined by the Act. The evidence as a whole reveals a significant and unresolved issue as to the safety and potential to pollute of the facility and its ships which are essential to the operation of the facility.

The Board finds, as a matter of fact, that the onshore component of the proposed facility is not a "manufacturing" facility. Rather, the facility is a single, integrated facility the onshore component of which exists solely to support the offshore component. The real sole purpose of the proposed facility is to serve as a bulk product transfer facility. Furthermore, the proposed facility has many of the characteristics of heavy industry and there remain significant questions regarding the potential impact on adjacent communities.

CONCLUSIONS OF LAW

Both the provisions of the Coastal Zone Act (7 Del. C. Chapter 70), ("the Act") and the Regulations Governing Delaware's Coastal Zone adopted May 11, 1999, as amended, ("Regulations") are binding on this Board.

Section 7003 of the Act absolutely prohibits new bulk product transfer facilities in the coastal zone. The proposed construction is a bulk product transfer facility as defined by § 7002 of the Act unless it qualifies for the exception found in the second sentence thereof: "Not included in this definition is a docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use."[1] The Regulations clarify this exception:

> The following uses or activities are permissible in the Coastal Zone by permit. Permits must be obtained prior to any land disturbing or construction activity.
>
> 1. The construction of pipelines or docking facilities serving as offshore bulk product transfer facilities if such facilities serve only one on-shore manufacturing or other facility. To be permissible under these regulations, the materials transferred through the pipeline or docking facilities must be used as a raw material in the manufacture of other products, or must be finished products being transported for delivery.

Regulations, § F.1.

Thus construction that otherwise would be prohibited as a bulk product transfer facility is permissible if it includes two distinct components: (1) a docking facility or pier or pipelines and (2) one single permitted on-shore manufacturing or other facility which

[1] Although the onshore part of the proposed construction is to be located in New Jersey and, therefore, is not eligible for a permit under the Act, the Board considers the nature of the entire construction for purposes of this decision and considers a facility which would be eligible for a permit if located in Delaware to be a "facility for which a permit is granted. . . ."

is served by the docking facility or pier or pipelines. "Docking Facility" is defined in the Regulations as follows:

> 6. "Docking Facility" means any structures and/or equipment used to temporarily secure a vessel to a shoreline or another vessel so that materials, cargo, and/or people may be transferred between the vessel and the shore, or between two vessels together with associated land, equipment, and structures so as to allow the receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment, and administrative maintenance purposes directly related to such receiving, accumulating, safekeeping, storage, and preparation of cargoes for further shipment.

Regulations, § C.6.

The construction would be prohibited if the onshore component is heavy industry, since all new heavy industry is prohibited and ineligible for a permit. The Act defines "heavy industry" at § 7002(e) as follows:

> "Heavy industry use" means a use characteristically involving more than 20 acres, and characteristically employing some but not necessarily all of such equipment such as, but not limited to, smokestacks, tanks, distillation or reaction columns, chemical processing equipment, scrubbing towers, pickling equipment and waste-treatment lagoons; which industry, although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs. Examples of heavy industry are oil refineries, basic steel manufacturing plants, basic cellulosic pulp-paper mills, and chemical plants such as petrochemical complexes. An incinerator structure or facility which, including the incinerator, contains 5,000 square feet or more, whether public or private, is "heavy industry" for purpose of this chapter. Generic examples of uses not included in the definition of "heavy industry" are such uses as garment factories, automobile assembly plants and jewelry and leather goods manufacturing establishments, and on-shore facilities, less than 20 acres in size, consisting of warehouses, equipment repair and maintenance structures, open storage areas, office and communications buildings, helipads, parking space and other service or supply structures required for the transfer of materials and workers in support of off-shore research, exploration and development operations; provided, however, that on-shore facilities shall not include tank farms or storage tanks.

DNREC and several public speakers argue that the Logan/Keystone cogeneration permit is not applicable precedent since that permit allowed the construction of a docking facility to serve an onshore component which properly is considered a manufacturing facility in that it consumes the off-loaded product (coal) and produces a different product (electricity) for distribution. In contrast, the proposed Crown Landing docking facility would serve an onshore component which would produce for distribution the same product (natural gas) that is off-loaded at the docking facility. DNREC argues that the more relevant precedent, cited by several public speakers, is the 1972 denial of a permit to El Paso Eastern Company for the construction of a pier in Delaware waters serving an LNG terminal in New Jersey. That denial, which was decided early in the history of the Act and predated the adoption of the Regulations, cites an analysis of the Act from the Attorney General which states, in part:

> It is quite clear that the legislative intent was to permit docking facilities where such facilities would benefit such industries as would be granted permits to operate in the Coastal Zone. Here the situation is reversed. The terminal will only exist as an adjunct to the docking facility. In other words, the important part of the project to El Paso Eastern is not the 'industrial facility' but the docking facility.

The Board finds a similar analysis applies to the proposed Crown Landing construction. Having found that the proposed construction is a single integrated facility for the bulk transfer of natural gas, the Board concludes, as a matter of law, that the entire proposed facility is a docking facility which does not support a manufacturing or other facility. Consequently, the proposed construction is absolutely prohibited by the Act and no permit therefor may be issued.

BOARD'S DECISION

For the foregoing reasons, the Board, by a unanimous vote of the six members present, affirms the Secretary's decision and finds that the proposed construction is a use absolutely prohibited by the Coastal Zone Act.

Date: _____

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Christine M. Waisanen
Chair

Date: _____

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John Allen
Board Member

Date: _____

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Paul Bell
Board Member

Date: _____

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Albert Holmes
Board Member

Date: _____

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Pallather Subramanian
Board Member

Date: _____

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Victor Singer
Board Member